



# **Resolving Removability Relief Issues:**

## **Waivers of Inadmissibility**

2018 Executive Office for Immigration Review

Legal Training Program

Attorney Advisor Camilo Rodriguez



# Waivers/Solutions to Inadmissibility: Crimes

## Waiver Under INA § 212(h)

- Waives following criminal grounds of inadmissibility:

Statute	Description
INA § 212(a)(2)(A)(i)(I)	CIMT
INA § 212(a)(2)(A)(i)(II)	Controlled Substance Offense (simple possession of 30 grams or less of marijuana)
INA § 212(a)(2)(B)	Multiple Criminal Convictions (with aggregate sentences to confinement of 5 years or more)
INA § 212(a)(2)(D)	Prostitution & Commercialized Vice
INA § 212(a)(2)(E)	Certain Aliens Involved in Serious Criminal Activity Who Have Asserted Immunity from Prosecution

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# Waivers/Solutions to Inadmissibility: Crimes

## 212(h) Waiver – 3 Ways to Qualify

1. Hardship
2. Rehabilitation
3. VAWA Self-Petitioners

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# Waivers/Solutions to Inadmissibility: Crimes

## 212(h) Waiver – Hardship (common)

- Extreme hardship to qualifying relative (USC/LPR spouse, parent, son/daughter)
  - Hardship Factors
    - (1) USC/LPR family ties in U.S.; (2) QR's family ties outside of U.S.; (3) country conditions and QR's ties to country of relocation; (4) financial impact of departure; (5) significant health conditions.
- Matter of Cervantes-Gonzales*, 22 I&N Dec. 560, 566 (BIA 1999).

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# Waivers/Solutions to Inadmissibility: Crimes

## 212(h) Waiver – Rehabilitation

- If applicant does not have QR.
- Requires:
  - Criminal activities that render applicant inadmissible occurred more than 15 years ago (This does not apply to inadmissibility under INA § 212(a)(2)(D));
  - Admission or AoS approval would not be contrary to national welfare, safety, and security; and
  - Applicant has been rehabilitated.

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## 212(h) Waiver – Heightened Standard

- Triggered by “violent or dangerous crimes.”
- Exceptional and Extremely Unusual Hardship (same as non-LPR COR)
  - Substantially beyond that which would ordinarily result from removal.
  - Primary factors include: age, health, length of residence in U.S., special educational needs, and family/community ties in U.S./abroad.
  - Secondary factors include: lower standard of living, diminished educational opportunities, poor economic conditions, linguistic barriers, and other adverse country conditions.
  - Note: Regulations do not specify hardship to whom. Ninth Circuit has clarified that hardship to both QR and applicant can be considered.

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## 212(h) Waiver – Miscellaneous Thoughts

- Does not waive controlled substance offense apart from simple possession.
- Not available for those that have conspired, attempted, or committed murder or torture.
- Not available if applicant was previously “admitted” as LPR, if, since date of “admission,” applicant has:
  - Been convicted of aggravated felony; or
  - Not lawfully resided continuously in U.S. for 7 years preceding initiation of removal proceedings.

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# Waivers/Solutions to Inadmissibility: Crimes

## 212(h) Waiver – Recurring Litigation

- Whether “admission” applies to an alien who acquired LPR status through AoS (within U.S.), or whether limitation only applies to those who were physically admitted into U.S. with an immigrant visa or after already having been granted LPR status.
  - Traditionally: Board held that LPRs convicted of aggravated felonies were not eligible for 212(h), no matter if they acquired status through AoS or admission after inspection at port of entry. See *Matter of Koljenovic*, 25 I&N Dec. 219, 225 (BIA 2010).
  - Currently: Board reversed course and followed the nine circuits that say AoS is not an “admission,” thus leaving affected applicants still eligible for 212(h). *Matter of J-H-J*, 26 I&N Dec. 563 (BIA 2015).

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## Waivers/Solutions to Inadmissibility: Crimes

### Stand-Alone 212(h) Waiver

- In limited circumstances, LPRs may apply for 212(h) without filing accompanying AoS application.
- When LPR is charged as an “arriving alien” on NTA. See *Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 282 (BIA 2014).
- Still must meet other 212(h) criteria.

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## Waivers/Solutions to Inadmissibility: Fraud & Misrepresentation

### Waiver Under INA § 212(i)

- Waives inadmissibility under INA § 212(a)(6)(C)(i) (fraud/misrepresentation)
- Standard: Extreme hardship to QR (USC/LPR spouse or parent)
  - More restrictive list of QRs than for 212(h) waiver; no USC/LPR sons or daughters.
  - Exception: VAWA self-petitioners can also show hardship to child and him/herself.
- Does not waive false claim to citizenship.

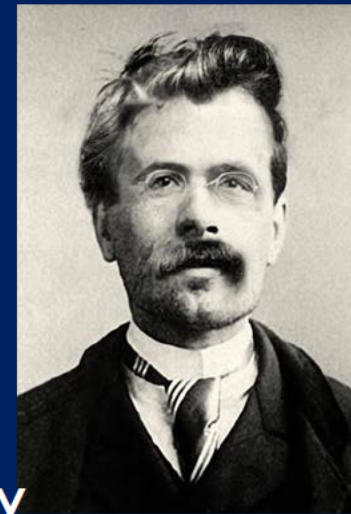
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# Waivers/Solutions to Inadmissibility

*"And if thou gaze long into 212(c), 212(c) will also gaze into thee." – Friedrich Nietzsche*



## Waiver Under INA § 212(c) – Intro

- Old form of relief, which was repealed by IIRAIRA, but continues to be revived and expanded by case law.
- Replaced by LPR cancellation.
- In short, waiver is still available to long-term LPRs to waive criminal convictions.

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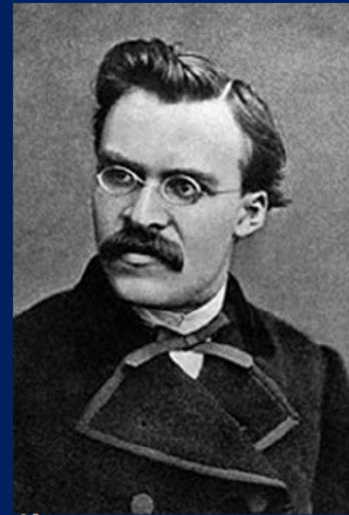
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## 212(c) – General Requirements (8 C.F.R. § 1212.3(f))

- LPR status
- 7 consecutive years of lawful unrelinquished domicile
- Not subject to inadmissibility under INA § 212(a)(3)(A) (security and related grounds), (B) (terrorist activities), (C) (foreign policy), (E) (Nazis), or INA § 212(a)(10)(C) (international child abduction)
- Merits a favorable exercise of Court's discretion

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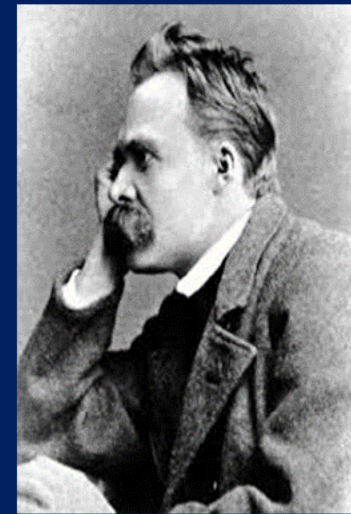
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## 212(c) – Specialized Considerations Based on Timing of Conviction

- Conviction or Plea on or After April 1, 1997
  - 212(c) not available
- Conviction or Plea Between April 24, 1996, and April 7, 1997
  - Qualifying convictions under AEDPA render applicant ineligible for 212(c)
- Conviction or Plea Between November 29, 1990, and April 24, 1996
  - Aggravated felony convictions, for which an aggregate term of imprisonment of 5 years is served, render applicant ineligible for 212(c)
  - AEDPA limitations do not apply
    - If in proceedings prior to April 24, 1996, AEDPA does not apply, regardless date of conviction
- Conviction or Plea Prior to November 29, 1990
  - 5-year aggravated felony bar does not apply
  - AEDPA limitations do not apply

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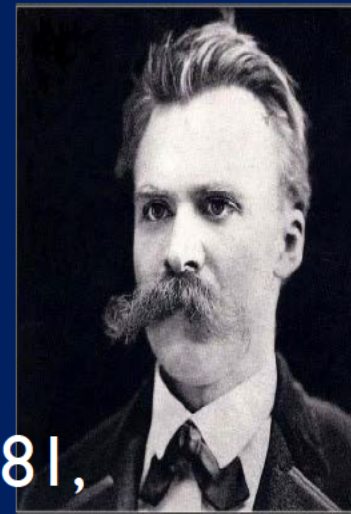
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212(c) – Discretion: Balancing of Equities  
Pursuant to *Matter of Marin*, 16 I&N Dec. 581,  
584-85 (BIA 1978)

- Factors include:
  - Family ties, duration of residence, hardship to applicant and family, service in U.S. armed forces, employment history, property or business ties, service to the community, rehabilitation, and evidence of good character.

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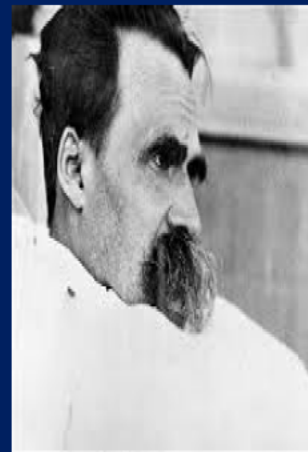
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# Waivers/Solutions to Inadmissibility

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## 212(c) – Suggested Reading

- 8 C.F.R. § 1212.3(f)-(h)
- *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014)
- *Judulang v. Holder*, 132 S. Ct. 476 (2011)
- *INS v. St. Cyr*, 533 U.S. 289 (2010)

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# Waivers/Solutions to Inadmissibility: Unlawful Presence Waivers

## Unlawful Presence Bars

- 3-Year Bar: accumulates more than 180 days, but less than 1 year, of unlawful presence, departs U.S., and seeks to reenter (or AoS) – INA § 212(a)(9)(B)(i)(I)
- 10-Year Bar: accumulates 1 year or more of unlawful presence, departs U.S., and seeks to reenter (or AoS) – INA § 212(a)(9)(B)(i)(II)
- Harsher 10-Year Bar: reenters, or attempts to reenter, without inspection after accumulating 1 year of unlawful presence OR after being deported – INA § 212(a)(9)(C)(i)
  - If reentry was prior to April 1, 1997, harsher 10-year bar does not apply.

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## **Waivers/Solutions to Inadmissibility: Unlawful Presence Waivers**

### **Waiver Under INA § 212(a)(9)(B)(v)**

- Waives: 3/10 year unlawful presence bars under INA § 212(a)(9)(B)(i)(I)-(II)
- Standard: Extreme hardship to QRs
- QRs: USC/LPR spouse or parent
  - Although hardship to child may be considered directly, the child's condition is considered as hardship to USC/LPR spouse.

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# Waivers/Solutions to Inadmissibility: Unlawful Presence Waivers

## Waivers Under INA § 212(a)(9)(C)(ii)-(iii)

- IJ does not have jurisdiction over these waivers; only DHS.
- Waiver Under § 212(a)(9)(C)(ii)
  - Only available 10 years since applicant's last departure from U.S. at Secretary of Homeland Security's discretion.
- Waiver Under § 212(a)(9)(C)(iii)
  - Only available for VAWA self-petitioners if there is a connection between the battering/extreme cruelty suffered and petitioner's removal/departure/reentry.

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# Waivers/Solutions to Inadmissibility: Public Charge & Affidavits of Support

## INA § 212(a)(4)(A)

- “Any alien who, in the opinion . . . of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”
- Factors: INA § 212(a)(4)(B)
  - Age, health, family status, assets, resources, financial status, education, and skills.

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# Waivers/Solutions to Inadmissibility: Public Charge & Affidavits of Support

## Form I-864, Affidavit of Support – INA § 213A

- For AoS, applicant is required to submit an affidavit from a sponsor.
- Generally sufficient to overcome public charge ground, but not guaranteed.
- Constitute binding agreement between sponsor and U.S. government.
- Sponsor(s) must show ability to support applicant 125% above the poverty level.

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# Waivers/Solutions to Inadmissibility: Public Charge & Affidavits of Support

## Form I-864, Affidavit of Support – INA § 213A

- Exemptions:
  - Not required in employment-based cases, unless a relative filed the I-140, or where relative has significant ownership interest in entity that filed petition. INA § 212(a)(4)(D).
  - Not required for diversity immigrants, special immigrants, VAWA self-petitioners, refugees and asylees adjusting status, Cuban adjustment applicants, registrants under INA § 249, and persons who have or earned or can be credited with 40 quarters of coverage pursuant to SSA regulations.
- The following individuals have to file a Form I-864W instead:
  - Individuals who have earned 40 quarters of coverage pursuant to SSA regulations
  - Intending immigrant children who will become USC's by virtue CSPA
  - VAWA self-petitioners

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# QUESTIONS?



"When we are tired, we are attacked by immigration laws we conquered long ago." – Friedrich Nietzsche

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